Supreme Court, U.S.
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In The Supreme Court of the United States

CHARLES LUTHER VARNER, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal agents were called in to assist local police in the execution of a state search warrant. The federal agents destroyed assorted chemicals, in sealed containers, and clean chemistry glassware, found stored in a cabinet, in violation of 21 U.S.C. § 881(f) and 28 C.F.R. § 50.21. The destroyed evidence was used in a federal prosecution for the manufacture of methamphetamine. The questions presented are:

1. Has the bad faith standard enunciated in *Arizona v. Youngblood*, 488 U.S. 51 (1988) proven so unworkable that this Court should revisit and clarify it?

2. Should the destruction of potentially exculpatory evidence in violation of standard law enforcement policy and procedure, such as the congressional and Department of Justice requirements of 21 U.S.C. § 881(f) and 28 C.F.R. § 50.21, raise a rebuttable presumption bad faith?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 12

I. THIS COURT SHOULD REVISIT THE *YOUNGBLOOD V. ARIZONA*, 488 U.S. 51 (1988), BAD FAITH STANDARD BECAUSE IT HAS PROVEN UNWORKABLE 14

A. Clarity Of The Bad Faith Standard Is Essential To The Protection Of A Criminal Defendant's Constitutional Right To Present A Complete Defense 14

B. The Courts Below Are In Conflict On Application Of The *Youngblood* Bad Faith Standard 17

TABLE OF CONTENTS - Continued

Page

1. Several State Courts Of Last Resort Have Rejected *Youngblood* Bad Faith Standard As Unworkable 20

2. Application Of The *Youngblood* Bad Faith Standard In The Federal Courts Of Appeal Lacks Uniformity 23

II. THE DESTRUCTION OF EVIDENCE IN VIOLATION OF STANDARD POLICY AND PROCEDURE SHOULD RAISE A REBUTTABLE PRESUMPTION OF BAD FAITH 27

A. Enforcement Of Congressional Intent And The Plain Meaning Of 21 U.S.C. § 881(f) Is Fundamental To A Criminal Defendant's Constitutional Right To Present A Complete Defense 28

B. This Court Should Settle The Important Question Of Whether The Destruction Of Potentially Exculpatory Evidence In Violation Of Standard Policy and Procedure Should Raise A Rebuttable Presumption of Bad Faith 30

CONCLUSION 31

APPENDIX

Opinion of the United States Court of Appeals for the Fourth Circuit, *United States v. Varner*, No. 06-4796 (4th Cir. Jan. 14, 2008) 1a

Order of the United States Court of Appeals for the Fourth Circuit Denying Petitioner's Petition for Rehearing and Rehearing en banc, *United States v. Varner*, No. 06-4796 (4th Cir. Feb. 15, 2008) 19a

Memorandum Opinion and Order of the United States District Court for the Western District of Virginia, at Harrisonburg Denying Petitioner's Motion to Dismiss and for Other Relief (E.D. Va. March 20, 2006) 20a

Defense Exhibits (Color Photographs) at Hearing in the United States District Court for the Western District of Virginia, at Harrisonburg on Petitioner's Motion to Dismiss and for Other Relief 35a

Return (Evidence List) for the Search Warrant Filed in the Circuit Court for Augusta County, Virginia 38a

TABLE OF AUTHORITIES

Page(s)

CASES

Arizona v. Youngblood,
488 U.S. 51 (1988) ..... *passim*

Boulware v. United States,
552 U.S. ___ 061509 (2008) 28

Brady v. Maryland,
373 U.S. 83 (1963) 15, 29

California v. Trombetta,
467 U.S. 479 (1984) ..... *passim*

Crane v. Kentucky,
476 U.S. 683 (1986) 14

Davis v. Alaska,
415 U.S. 308 (1974) 14

Ex parte Gingo,
605 So.2d 1237 (Ala. 1992) 25

Florida v. Royer,
460 U.S. 491 15

Hawaii v. Matafeo,
787 P.2d 671 (Haw. 1990) 18-19

Holmes v. South Carolina,
547 U.S. 319 (2006) 14

TABLE OF AUTHORITIES - Continued

Page(s)

Hammond v. Delaware,
569 A.2d 81 (Del. 1989) 20-22, 31

Illinois v. Fisher,
540 U.S. 544 (2004) 17

Illinois v. McArthur,
531 U.S. 326 (2001) 15

Jones v. McCaughtry,
965 F.2d 476 (7th Cir. 1992) 26-27

Kyles v. Whitley,
514 U.S. 419 (1995) 15, 29

Lolly v. Delaware,
611 A.2d 956 (Del. 1992) 20, 23, 31

Lopez v. United States,
373 U.S. 427 (1963) 16, 30

Massachusetts v. Henderson,
582 N.E.2d 496 (Mass. 1991) 18, 22

Michigan v. Summers,
452 U.S. 692 (1981) 15

New Hampshire v. Smagula,
578 A.2d 1215 (N.H. 1990) 26

Pena v. Texas,
166 S.W.3d 274 (Tex. 2005)..... 19, 21, 23, 31

TABLE OF AUTHORITIES - Continued

Page(s)

Platt v. Minnesota Mining & Manuf. Co.,
376 U.S. 240 (1964) 27

Regalado Cuellar v. United States,
552 U.S. ___ 061456 (2008) 28

Roviaro v. United States,
353 U.S. 53 (1957) 15

Smith v. Maryland,
442 U.S. 735 (1979) 15

Tennessee v. Ferguson,
2 S.W.3d 912 (Tenn. 1999) 20, 22

Thorne v. Dept. of Public Safety,
774 P.2d 1326 (Alaska 1989) 21

United States v. Beckstead,
500 F.3d 1154 (10th Cir. 2007) 24

United States v. Bohl,
25 F.3d 904 (10th Cir. 1994) 19, 23-24

United States v. Chaparro-Alcantara,
226 F.3d 616, (7th Cir. 2000) 26

United States v. Cooper,
983 F.2d 928 (9th Cir. 1993) 19

United States v. Deaner,
1 F.3d 192 (3d Cir. 1993) 19, 25

TABLE OF AUTHORITIES - Continued

Page(s)

United States v. Garza,
435 F.3d 73 (1st Cir. 2006) 23, 25

United States v. Gomez,
191 F.3d 1214 (10th Cir. 1999) 25

United States v. Greenwood,
No. 06-4339 (4th Cir. 2007) 25

United States v. Heffington,
952 F.2d 275 (9th Cir. 1991 26

United States v. Jobson,
102 F.3d 214 (6th Cir. 1996) 26-27

United States v. Malbrough,
922 F.2d 458 (8th Cir. 1990) 25-26

United States v. Moore,
452 F.3d 382 (5th Cir. 2006) 25

United States v. Santos,
552 U.S. ___ 0011543 (2008) 28

United States v. Valenzuela-Bernal,
458 U.S. 858 (1982) 16

United States v. Van Leeuwen,
397 U.S. 249 (1970) 15

TABLE OF AUTHORITIES - Continued

Page(s)

Virginia v. Varner,
No. GC04013128-00, GC04013129-00
(Augusta County Gen. Dist. Ct. 2004) 4

Vermont v. Bailey,
475 A.2d 1045 (1984) 22

Vermont v. Gibney,
825 A.2d 32 (Vt. 2003) 22

Watson v. United States
552 U.S. ___ 06571 (2007) 28

West Virginia v. Osakalumi,
461 S.E.2d 504 (W.Va. 1995) 22

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution
Amendment V 1, 14

United States Constitution
Amendment VI 1, 14

18 U.S.C. § 2518 15

18 U.S.C. § 3103a 15

18 U.S.C. § 3144 15

18 U.S.C. § 3161 30

Page(s)

21 U.S.C. § 841 ..... 2, 4, 8

21 U.S.C. § 846 ..... 2, 4, 8

21 U.S.C. § 881 ..... *passim*

REGULATORY PROVISIONS

28 C.F.R. § 50.21 ..... *passim*

CONGRESSIONAL RECORDS

Pub. L. No. 101-647 § 2004 28

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit is reprinted at Pet. App. 1a.[1] Its order denying rehearing and rehearing en banc is reprinted at Pet. App. 19a. The Memorandum Opinion of the United States District Court for the Western District of Virginia at Harrisonburg denying Petitioner's motion for relief based on the destroyed evidence is reprinted at Pet. App. 20a.

JURISDICTION

The Fourth Circuit entered judgment, sustaining the lower court, on January 14, 2008. A timely petition for rehearing and rehearing en banc was denied on February 15, 2008. The Chief Justice of this Court granted an application for an extension of time to file a petition for a writ of certiorari on April 16, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATOTURY PROVISIONS INVOLVED

The Appendix, Pet. App. 45a-52a, reproduces the text of the Fifth Amendment, U.S. Const. amend. V; the Sixth Amendment, U.S. Const. amend. VI; the provisions of 21 U.S.C. § 881(f); and the provisions of 28 C.F.R. § 50.21, which are at issue in this case.

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[1] The Appendix filed with this Petition is cited as "Pet. App." The joint appendix filed with the Fourth Circuit is cited as "JA."

STATEMENT OF THE CASE

This case had its genesis when an anonymous source told state law enforcement agents that Charles Varner ("Varner") had a whiskey still and was making moonshine. Pet. App. 3a. Agents searched his home with a state search warrant and found the still, whiskey, and two plastic bags of methamphetamine, as well as storage cabinets containing a variety of assorted chemicals in their sealed containers and assorted chemistry glassware. Pet. App. 4a, 35a-37a, 39a-44a. The glassware appeared clean and unused. Pet. App. 36a.

At some point during the search, state law enforcement called federal agents to assist them in executing the warrant. The federal agents kept the two plastic bags of methamphetamine that the state needed for its prosecution of manufacture and possession with the intent to distribute methamphetamine, and destroyed all of the assorted chemicals and glass chemistry equipment. Pet. App. 4a-5a.

Varner was originally prosecuted in state court, but federal authorities took over that case, charging him with conspiracy to manufacture and possession with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841 and 846 and other offenses. JA 16-27. Varner sought either dismissal of the methamphetamine manufacturing charges or exclusion of the destroyed evidence because, if not destroyed, the assorted chemicals in their containers and the clean, unused glassware could have established that he did not manufacture methamphetamine. Pet. App. 27a-29a; JA 35-39.

The destruction of the evidence violated the congressional requirements in 21 U.S.C. § 881(f) and the Attorney General's policy in 28 C.F.R. § 50.21. No agent, government witness or exhibit established why the evidence was destroyed or that the destruction was consistent with any policy or protocol. JA 138-79. Government photographs and the search warrant return establish that the chemicals were non-hazardous, and were not methamphetamine, and that the glassware appeared clean and unused. Pet. App. 35a-37a, 43a-44a.

When the district court denied Varner's requested relief of dismissal or exclusion, he entered into a plea agreement that preserved his right to appeal the destruction of evidence issue. Pet. App. 32a, 34a; JA 280-81. The Fourth Circuit also denied relief, and Varner now comes before this Court asking for a decision on the effect of the willful destruction of potentially exculpatory evidence in violation of standard policy and procedure, such as the congressional requirements of 21 U.S.C. § 881(f) and the Department of Justice policy promulgated by the Attorney General in 28 C.F.R. § 50.21.

The Destruction Of The Evidence

On November 10, 2004, Virginia law enforcement agents executed a search warrant at Charles Varner's home in Augusta County. They discovered a whiskey still, two plastic bags of methamphetamine and a variety of assorted chemicals in their sealed containers stored in cabinets in the garage. Pet. App. 35a, 39a-44a. Also found on cabinet shelves were various pieces of chemistry glassware, unassembled and apparently clean and unused. Pet. App. 36a, 43a-44a.

Federal Drug Enforcement Agents were called to the scene. They moved the chemicals, in their containers, from the cabinets to a table for inspection and placed the chemistry glassware on a tarp. Pet. App. 35a-36a. The glassware was not assembled for use as a methamphetamine lab and the chemicals were non-hazardous and non-dangerous, as evidenced by the agents working around and inspecting them without the use of any protective gear. Pet. App. 37a.

Varner arrived at home during the search with a small amount of methamphetamine in his pocket and a pistol in his truck. He was arrested and charged under the Virginia Code with manufacture and possession with intent to distribute methamphetamine, possession of a firearm, and whiskey offenses. Varner was taken to the local jail and produced before a magistrate. State charges were filed and Varner was released on bond pending a preliminary hearing in state court. *Virginia v. Varner*, No. GC04013128-00, GC04013129-00 (Augusta County Gen. Dist. Ct. 2004).

Pursuant to state law, the local state agents listed the items seized on the search warrant return, which was filed with the Augusta County, Virginia, Circuit Court, thereby placing the evidence under the control of that court. Pet. App. 38a-43a; JA 57-76. Federal prosecutors took over the state case and indicted Varner for conspiracy to manufacture and possession with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841 and 846, and other charges. Pet. App. 2a-3a; JA 16-27.

The seized methamphetamine was retained for the prosecution, but all of the various and assorted chemicals, in their sealed containers, and the unused glassware were destroyed by the federal Drug Enforcement Administration agents. JA 386. That destruction occurred on the day the items were seized. JA 188-89, 386.

Pre-Trial Proceedings In The District Court

Because the federal authorities intended to use the destroyed chemicals and glassware in the federal prosecution, Varner filed in the district court a motion to dismiss, and for any other appropriate relief, including exclusion of that evidence. JA 35-39, 187. At the hearing on that motion, the trial court was provided with copies of the search warrant return, which established that, in addition to methamphetamine, various other assorted chemicals also were seized, along with unused, clean chemistry glassware. Pet. App. 43a-44a; JA 210.

Color photographs, provided to the trial court at the hearing, depicted the glassware and chemicals, stored unused in cabinets, as well as agents conducting their activities around the chemicals, which they placed on a card table, without the need for any protective gear because the chemicals were not hazardous. Pet. App. 35a-37a. The glassware, similarly, was depicted spread out on a tarp, in its unassembled state, apparently clean and unused. Pet. App. 37a. The only chemicals used were those in a fume hood, in which Varner was using acid to extract platinum from metal. Pet. App. 17a.

No government agent or witness has testified to explain why the potentially exculpatory evidence was destroyed the day it was seized, nor to claim that it was dangerous or hazardous, nor to dispute what the photographs established, *i.e.*, that the chemicals were in their sealed containers and the glassware was unassembled, clean and unused. Pet. App. 17a; JA 138-79.

Similarly, no federal agent or other witness claimed to have relied on any protocol, procedure or policy when they destroyed this evidence. Pet. App. 17a. There was no testimony, or other evidence, that the Attorney General directed the destruction of these materials or that these materials satisfied the requirements of 21 U.S.C. § 881(f)(2), *i.e.*, that they were dangerous, toxic, or hazardous raw materials or products, or that the equipment and containers could not be separated safely from such raw materials or products.

Finally, no federal agent or other witness claimed to have notified or made any inquiry of any state or federal prosecutor prior to the destruction. Federal agents did not wait 60 days after providing notice to an appropriate prosecutor before destroying the evidence, as required by the Department of Justice policy in 28 C.F.R. § 50.21. In fact, the potentially exculpatory evidence was destroyed immediately after it was seized and examined by the agents. JA 188-89, 386.

The prosecutor, in his response to Varner's motion, had claimed the evidence would show that the agents followed some standard practice, but, at the hearing in the district court, he presented no testimony or exhibit to support his claim. JA 44.

The court was not offered evidence of any policy or procedure, nor any reason for the destruction of the potentially exculpatory evidence. Pet. App. 17a.

The trial judge, at the conclusion of the hearing, said that he was "...not buying the notion that because someone has...not followed the law, that they have acted in bad faith. I still ask the question of bad faith. That is still the question. Did they do it intentionally?" JA 197. The evidence established that the federal agents had destroyed the assorted chemicals and glassware intentionally. They called someone to the search site for the sole purpose of destroying this evidence. JA 386.

The district court found that the agents had not violated 21 U.S.C. § 881(f)(2) when they intentionally destroyed the glassware and chemicals and, without any testimony from the agents, also determined that they did not know the law, 21 U.S.C. § 881(f)(2), which prohibited their destruction of the evidence. Pet. App. 31a. The court further decided that the agents did not know that the evidence was exculpatory and did not know that it could somehow prejudice Varner's defense to the manufacturing charge. Pet. App. 31a-32a.

The district court recognized that the destroyed glassware and chemicals, in the main, were unused at the time of destruction, a point the government conceded at the hearing, but, according to the court, that did not provide any basis to believe that the items had apparent exculpatory value in a manufacture of methamphetamine case. Pet. App. 32a, n. 6. The court upheld the destruction by reasoning, illogically on these facts, that officers "...often need to make split-second decisions affecting

life and limb." Pet. App. 32a. The trial court also found that the evidence had no potentially exculpatory value and that the agents followed a protocol despite the total absence of any evidence of one. Pet. App 30a, 32a.

After the district court denied Varner relief, a plea agreement was entered that permitted Varner to preserve the issue for appeal. JA 280-81. Pursuant to the plea agreement, Varner was convicted of conspiracy to manufacture and possession with intent to distribute methamphetamine, 21 U.S.C. §§ 841, 846; possession of a firearm in furtherance thereof, 18 U.S.C. § 924(c); and possession of an unregistered distilling apparatus for spirits, 26 U.S.C. § 5601. JA 375.

Varner was sentenced to 120 months on the drug conspiracy count, 60 months concurrent for the illegal whiskey still, and 60 months consecutive for the firearm.[2] His total sentence was 128 months. JA 375, 376. Additionally, the court imposed an assessment of $300.00, a fine of $7,500.00 and restitution to the Drug Enforcement Administration of $7,445.46, which was asserted to be the cost for the destruction of the evidence, although no justification for that amount was offered or produced. JA 379. Varner timely noted his appeal to the Fourth Circuit Court of Appeals.

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[2] Varner pled guilty to the pistol found in his truck. The various hunting weapons that were in the house and the black power hunting rifle in his truck were not the subject of his plea.

Proceedings In The Court Of Appeals

On appeal to the Fourth Circuit, Varner contended that the destruction of the exculpatory evidence by the federal agents was unlawful because it violated 21 U.S.C. § 881(f)(2) and 28 C.F.R. § 50.21. He argued, on the manufacturing conspiracy charge, that the assortment of unused chemicals in their sealed containers and, in particular, the unassembled, clean, unused glassware stored on the cabinet shelves was exculpatory evidence for the defense, which would have been obvious to the federal Drug Enforcement Agents when they examined it prior to its destruction. Varner requested that the court of appeals find that the destruction was unlawful and either dismiss the case or remand it to the district court for further proceedings.

Congress provided, in 21 U.S.C. § 881(f), that the Attorney General may direct the destruction of toxic, hazardous raw materials, equipment, and containers when they cannot be safely separated; the Attorney General had not done so in this case. Furthermore, 28 C.F.R. § 50.21, promulgated by the Attorney General, is the Department of Justice policy on the destruction of seized § 881(f) contraband drug evidence. It requires notice to the appropriate state or federal prosecutor 60 days prior to the destruction of any seized contraband drug evidence. 28 C.F.R. § 50.21(e)(1). No such notice was given in this case.

The Fourth Circuit, unlike the district court, found that there was "little doubt that the chemicals and glass potentially possessed exculpatory value." Pet. App. 16a-17a. The Fourth Circuit also

recognized that the district court had accepted the prosecutor's unsubstantiated assumption that the agents had followed some unknown protocol as sufficient to rebut bad faith. The district court's assumption was not supported by any evidence of a protocol or claim of an agent to have followed a protocol, and that court had not taken judicial notice of any protocol. Pet. App. 17a.

In its opinion, the Fourth Circuit held that Varner "... would have to show that...the agents knew that the chemicals were not methamphetamine, but rather an innocuous substance," to demonstrate bad faith. Pet. App. 17a-18a. The decision ignored the search warrant return, written by the agents, which established that they had seized various assorted chemicals in addition to the methamphetamine. Pet. App. 15a-18a. The decision also ignored the government's photographs of the search, which established that the agents considered the various assorted chemicals to be non-hazardous and non-dangerous, since the agents did not require any protective gear to be around and handle them. Pet. App. 16a, 35a-37a, 43a-44a.

As an alternative, the Fourth Circuit decided that Varner had to show that "the agents understood that the materials were not hazardous and destroyed them on the off chance that the chemicals were not methamphetamine." Pet. App. 18a. That reasoning is contrary to the facts established both by the search warrant return, which indicates that agents seized "various chemicals," not methamphetamine, and by the conduct of the agents depicted in the

photographs, which shows that the chemicals were not hazardous. Pet. App. 18a, 35a-37a, 43a-44a.

The Fourth Circuit opinion also stated that it was impossible to determine what the agents knew about the materials they destroyed because the chemicals and laboratory equipment were not tested prior to the destruction. Pet. App. 17a. Following that rationale, it is never possible to establish the bad faith destruction of materials if they are not tested prior to destruction, and thus, agents can avoid ever facing a claim of bad faith by destroying material without first testing it.

Finally, the circuit indicated that it did not want to establish a *per se* rule that automatically implied bad faith when law enforcement officers violate the congressional requirements of 21 U.S.C. § 881(f)(2) because it would be "imprudent."[3] Pet. App.

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[3] Varner did not request a *per se* rule in either the district court or the court of appeals. Both lower courts, however, decided that a *per se* rule would be "hazardous" and "imprudent." Pet. App. 18a, 32a. Varner sought the remedy of dismissal or remand of the case in the court of appeals. On remand, of course, if the agents had an explanation for the destruction, they could offer it and the district court could decide what course to follow.

In an argument unrelated to the bad faith question presented to the court of appeals, Varner suggested a *per se* rule for violation of the Ninth and Tenth Amendments to the United States Constitution. *See* Brief of Appellant, No. 06-4796 at 30-31. Specifically, on the question of whether federal agents may lawfully seize evidence under the

18a. Varner's petition for a rehearing was denied. Pet. App. 19a.

Varner was denied a meaningful opportunity to present a complete defense and to confront, by adversarial testing, the evidence against him because of the lower courts' denial of relief for the intentional destruction of potentially exculpatory evidence in violation of the congressional requirements of 21 U.S.C. § 881(f) and the Department of Justice policy, promulgated by the Attorney General, in 28 C.F.R. § 50.21.

Varner is asking this Court to rule on the effect of the unexplained destruction of potentially exculpatory evidence in violation of an act of Congress and a policy and regulation promulgated by the Attorney General. Other circuits have found that the destruction of evidence in compliance with a standard policy or procedure is not bad faith, while the Fourth Circuit has found that the destruction of potentially exculpatory evidence in violation of congressional and Department of Justice requirements also is not bad faith.

REASONS FOR GRANTING THE WRIT

When deciding *California v. Trombetta*, 476 U.S. 479 (1984) and *Arizona v. Youngblood*, 488 U.S. 51 (1988), this Court addressed the meaningful importance of a defendant's right to present a complete defense, including the right to use evidence

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control of a state court in a pending state prosecution without a state court order or notice, Varner asked the court of appeals to find that such conduct was *per se* unlawful.

gathered by the government, and the duty of the government to preserve evidence. In each of these cases, the police failed to preserve evidence, but were acting in accordance with standard police practice and procedure.

Not wanting to impose an unreasonable burden on the government to preserve "...all material that might be of conceivable evidentiary significance in a particular prosecution," this Court, in *Youngblood*, adopted the *Trombetta* standard of potentially exculpatory evidence, to wit, (1) whether the exculpatory value was apparent before the evidence was destroyed, (2) the availability of comparable evidence by other reasonably available means, and added the requirement that (3) the defendant show bad faith on the part of the police. *See Trombetta*, 476 U.S. at 488-89; *Youngblood*, 488 U.S. at 58.

Unfortunately, over time, application of the *Youngblood* bad faith standard has proved to be unworkable. In this case, for example, federal agents deliberately destroyed what the Fourth Circuit decided was potentially exculpatory evidence, without any explanation, and in clear violation of the requirements for the preservation of evidence in drug cases established by Congress in 21 U.S.C. § 881(f) and by the Attorney General in 28 C.F.R. § 50.21. The Fourth Circuit, nonetheless, did not find bad faith. Pet App. 15a-18a.

Several state courts of last resort have rejected the bad faith standard set by this Court because it is unworkable and, instead, have adopted an approach based on a balancing analysis. The federal courts of appeal also have difficulty with this

standard, as is shown by their lack of consistent treatment of the issue of bad faith.

Destruction of evidence, particularly in drug cases, is an important, recurring issue. This Court should hear this case and decide whether the unexplained destruction of potentially exculpatory evidence in violation of clearly established policy and procedure, such as 21 U.S.C. § 881 and 28 C.F.R § 50.21, should raise a rebuttable presumption of bad faith. Unless enforced by the courts, the requirements established by Congress and the Attorney General for the preservation, or destruction, of evidence in drug cases would have no meaning. Bad faith would remain an almost insurmountable burden for a defendant to meet.

I. THIS COURT SHOULD REVISIT THE *YOUNGBLOOD V. ARIZONA*, 488 U.S. 51 (1988), BAD FAITH STANDARD BECAUSE IT HAS PROVEN UNWORKABLE.

A. Clarity Of The Bad Faith Standard Is Essential To The Protection Of A Criminal Defendant's Constitutional Right To Present A Complete Defense.

A criminal defendant has a fundamental constitutional right to a fair and meaningful opportunity to present a complete defense. U.S. Const., amend. V and VI; *Crane v. Kentucky*, 476 U.S. 683, 687 (1986) (citing *California v. Trombetta*, 467 U.S. 479, 485 (1984)); *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006).

To this end, a criminal defendant has a long-protected constitutional right to call for evidence on his behalf, *Davis v. Alaska*, 415 U.S. 308 (1974),

including favorable evidence obtained by the government. *See Brady v. Maryland*, 373 U.S. 83 (1963) (exculpatory evidence); *Roviaro v. United States*, 353 U.S. 53 (1957) (eyewitness or participating confidential informant); *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (prosecutor's "duty to learn of any favorable evidence known to others acting on the government's behalf").

Staunch protection of this right is essential to a fair trial considering the government's expansive authority to gather evidence against an accused. *See* 18 U.S.C. § 3103a (sneak and peak warrants); 18 U.S.C. § 3144 (detention of material witnesses); 18 U.S.C. § 2518 (wiretaps); *Smith v. Maryland*, 442 U.S. 735 (1979) (pen registers); *Florida v. Royer*, 460 U.S. 491 (1983) (detention of person); *Michigan v. Summers*, 452 U.S. 692 (1981) (detention of occupants on premises during execution of search warrant); *Illinois v. McArthur*, 531 U.S. 326 (2001) (restraint from entering premises while obtaining search warrant); *United States v. Van Leeuwen*, 397 U.S. 249 (1970) (detention of property).

Because a criminal defendant has a right to present a complete defense premised on favorable, government-obtained evidence, the government has a duty to preserve evidence that "both possess[es] an exculpatory value that was apparent before the evidence was destroyed, and...[is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Trombetta*, 467 U.S. at 489.

When the government destroys such potentially exculpatory evidence in good faith, however, it has not denied a criminal defendant his

"constitutionally guaranteed access to evidence." *Id.* at 485, 488 (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982)). As this Court held in *Trombetta*, the government acts in good faith when it follows standard policy and procedure on the preservation, or destruction, of evidence. 467 U.S. at 482-83, 488.

When government destruction of potentially exculpatory evidence is not pursuant to a standard policy or procedure, the defendant must prove that the evidence was destroyed in bad faith in order to obtain relief. *Arizona v. Youngblood*, 488, U.S. 51, 57-58 (1988). Bad faith is proved only when "police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." *Id.* at 58. This standard is unworkable because it lacks clarity, and furthermore, is virtually unattainable.

As lower courts have generally interpreted *Youngblood*, a defendant must prove the character of the destroyed evidence by introducing evidence of the conduct of the police. The *Youngblood* standard is not based on police knowledge that the evidence is exculpatory, or police violation of controlling policy, departmental procedure or law. Requiring a defendant to prove that the evidence could exonerate him based solely on police conduct is tantamount to limiting proof of bad faith to a confession by the police. That is an unworkable standard.

Because the function of a "criminal trial is to seek out and determine the truth or falsity of the charges," *Lopez v. United States*, 373 U.S. 427, 440 (1963), and is safeguarded by the counterbalance of the government's authority to gather evidence and a

criminal defendant's right to present a complete defense, using government-obtained evidence, this Court should revisit its decision in *Youngblood* and consider whether the destruction of potentially exculpatory evidence in violation of standard policy and procedure should raise a rebuttable presumption of bad faith.[4]

B. The Courts Below Are In Conflict On Application Of The *Youngblood* Bad Faith Standard.

In order to first satisfy the *Trombetta* potentially exculpatory evidence standard, a defendant must prove that the destroyed evidence possessed exculpatory value that was apparent before they destroyed it. 467 U.S. at 489. In order to then satisfy the *Youngblood* bad faith standard, a defendant must prove that police, by their conduct,

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[4] Varner is not asking this Court to consider a *per se* rule whereby violation of standard policy and procedure automatically constitutes bad faith. As this Court has noted, a *per se* rule would negate the purpose behind the bad faith standard. *Illinois v. Fisher*, 540 U.S. 544, 548 (2004) (holding that the existence of a pending discovery request does not eliminate the defendant's burden of proving the *Youngblood* bad faith standard).

A rebuttable presumption of bad faith in the narrow class of cases where police violate standard policy and procedure, unlike a *per se* rule, would adequately protect that purpose. If police have a valid, lawful explanation, then the presumption is rebutted.

indicated that the evidence was potentially exculpatory.[5] 488 U.S. at 58.

The *Youngblood* bad faith standard is unworkable because it limits proof of bad faith to the conduct of police as defining the nature of the evidence that was destroyed. This is in sharp contrast to the *Trombetta* standard of potentially exculpatory evidence whereby a criminal defendant can meet his burden of proof by showing that the nature of the evidence was apparent before the police destroyed it. 467 U.S. at 489.

While the *Youngblood* bad faith standard was intended to limit relief "to that class of cases where the interests of justice more clearly require it," the lower courts have often confused the *Youngblood* limitation on proving the nature of the evidence with the *Trombetta* threshold standard that the destroyed evidence be potentially exculpatory. *See* 488 U.S. at 58. Defining bad faith by the nature of the destroyed evidence, which is defined solely by police conduct, has proved to be so problematic that some states have abandoned it federal courts have applied it inconsistently.

Several state courts of last resort have agreed with Justice Stevens, in his concurrence, and ultimately, have rejected *Youngblood* as unworkable. *See e.g. Massachusetts v. Henderson*, 582 N.E.2d 496, 497 (Mass. 1991); *Hawaii v. Matafeo*, 787 P.2d

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[5] "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Youngblood*, 488 U.S. at 58.

671, 673 (Haw. 1990). One state court, upon surveying the application of *Youngblood* in its state and the federal courts of appeal, found only two Texas cases and few federal cases holding that the defendant established bad faith. *Pena v. Texas*, 166 S.W.3d 274, 280-81 (2005) (citing *United States v. Cooper*, 983 F.2d 928, 931 (9th Cir. 1993), in which the government acted in bad faith by deceptively informing the defendant that it had preserved the potentially exculpatory evidence of an alleged methamphetamine laboratory even though it had already been destroyed, and *United States v. Bohl, infra*.).

Application of *Youngblood* among the federal courts of appeal lacks uniformity because the enunciated standard is unclear. The Tenth Circuit has held that the standards articulated in *Trombetta* and *Youngblood* are mutually exclusive, *United States v. Bohl*, 25 F.3d 904 (10th Cir. 1994); the Third Circuit has interpreted *Youngblood* as holding that negligent non-compliance with standard procedure, so long as it amounts to substantial compliance, is not bad faith, *United States v. Deaner*, 1 F.3d 192 (3d Cir. 1993); and the Fourth Circuit has held that the unexplained violation of standard procedure, in this case congressional and departmental requirements, is not bad faith.

This Court should grant this Petition and clarify the bad faith standard that criminal defendants must prove before a court will protect their fundamental constitutional right to present a complete defense, using government-obtained evidence.

1. Several State Courts Of Last Resort Have Rejected The *Youngblood* Bad Faith Standard As Unworkable.

Several state courts have rejected the *Youngblood* standard because it is unworkable and, instead, have chosen to adopt a more workable due process standard on the destruction of potentially exculpatory evidence under their state constitutions.[6] *See e.g. Hammond v. Delaware*, 569 A.2d 81, 87 (Del. 1989) (law enforcement conduct is a relevant consideration, but is not *solely* and *exclusively* determinative); *Tennessee v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999) (the *Youngblood* standard "would be, in the least, extremely difficult" to meet, as it "substantially increases the defendant's burden while reducing the prosecution's burden at the expense of the defendant's fundamental right to a fair trial").

The Supreme Court of Delaware defined the "practical difficulty in proving" the *Youngblood* standard as "obvious. Short of an admission by the police, it is unlikely that a defendant would ever be able to make the necessary showing to establish the required elements for proving bad faith." *Lolly v. Delaware*, 611 A.2d 956, 960 (Del. 1992). It is

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[6] While states may afford individuals greater constitutional rights under their state constitutions than are afforded under the Federal Constitution, the fact that states have chosen to reinterpret the due process guarantees of their constitutions after this Court decided *Youngblood* and have explicitly rejected the *Youngblood* standard as unworkable is significant.

substantially unlikely, if not virtually impossible, for a defendant to obtain a confession from a law enforcement officer who was aware of the potentially exculpatory nature of the evidence, had a duty to gather and preserve it, and deliberately refused to perform that duty. *See Id.*

The Court of Appeals of Texas, though not a court of last resort, eloquently explained this practical difficulty in that:

> *Youngblood* has the immediate result of being ineffective in preventing the intentional destruction of useful evidence, and thus not only loses its deterrent effect, but encourages the designed loss of evidence...'The *Youngblood* decision could have the unfortunate effect of encouraging the destruction of evidence to the extent that evidence destroyed becomes merely potentially useful since its contents would be unprovable.'

Pena, 166 S.W.3d at 279 (quoting *Thorne v. Dept. of Public Safety*, 774 P.2d 1326, 1331, n.9 (Alaska 1989)).

In order to overcome the practical defects of the *Youngblood* standard, several states have adopted a balancing approach to the bad faith analysis. For example, in Delaware, the courts look to the degree of negligence (or bad faith) on the part of the police, the of probative value of the missing evidence, the reliability of secondary or substitute evidence that remains available, and the sufficiency of other evidence. *Hammond*, 569 A.2d at 87. Delaware does not limit bad faith to proof of police

conduct indicating that the evidence was potentially exculpatory.

Other states, in agreement with Delaware, have rejected the *Youngblood* standard as virtually impossible to meet, and have adopted a balancing approach to the bad faith analysis. *See Tennessee v. Ferguson*, *supra*. (adopting *Hammond*); *West Virginia v. Osakalumi*, 461 S.E.2d 504, 512 (W.Va. 1995) (same). The Supreme Court of Vermont, for example, has decided on "a pragmatic balancing" of "(1) the degree of negligence or bad faith on the part of the government; (2) the importance of the evidence lost; and (3) other evidence of guilt adduced at trial." *Vermont v. Gibney*, 825 A.2d 32, 42-43 (Vt. 2003) (affirming *Vermont v. Bailey*, 475 A.2d 1045 (1984)). The Supreme Court of Massachusetts has decided on a balancing of "the degree of culpability of the government, the materiality of the evidence, and the potential prejudice to the defendant." *Henderson*, 582 N.E.2d at 497.

Greater clarity in the federal definition of bad faith would help to eliminate any errant incentive to intentionally destroy potentially exculpatory evidence.[7] It is also necessary to uphold a criminal defendant's right to present a complete defense. This Court did not anticipate that lower courts would interpret *Youngblood* as imposing on a defendant a virtually insurmountable burden, but state courts of last resort have read the *Youngblood*

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[7] In this case, for example, the Fourth Circuit said that Varner could not prove bad faith for the very reason that the agents destroyed the evidence without testing it. Pet. App. 17a-18a.

bad faith standard in that light. *See e.g. Lolly*, 611 A.2d at 960; *Pena*, 166 S.W.3d at 279.

2. Application Of The *Youngblood* Bad Faith Standard In The Federal Courts Of Appeal Lacks Uniformity.

The *Trombetta* decision is clear. The government acts in good faith when it destroys potentially exculpatory evidence pursuant to standard law enforcement policy and procedure. 467 U.S. at 482-83, 488. The *Youngblood* decision, however, muddied *Trombetta*'s clarity and its protection of a criminal defendant's due process guarantee of access to government-obtained evidence.

The Tenth Circuit Court of Appeals decision in *United States v. Bohl*, 25 F.3d 904 (10th Cir. 1994) most acutely exemplifies the difficulty federal courts have faced in applying the *Youngblood* bad faith standard. In *Bohl*, one of few federal cases in which bad faith was found, the court announced that the *Trombetta* and *Youngblood* decisions were mutually exclusive. *Id.* at 910.

The degree of the exculpatory value of the evidence, according to the Tenth Circuit, determines whether to apply *Trombetta* or *Youngblood*. When the destroyed evidence has a greater, more apparent exculpatory value, *Trombetta* applies. *Youngblood* applies when the destroyed evidence is only potentially useful, meaning that the results of tests not conducted might have exonerated the defendant. *Id.* at 910. *See also United States v. Garza*, 435 F.3d 73, 75 (1st Cir. 2006) (the *Youngblood* standard only

applies when the destroyed evidence is potentially exculpatory, not when it is apparently exculpatory).

In *Bohl*, *Trombetta* did not apply because tests conducted on the evidence prior to destruction suggested that it was not *apparently exculpatory*. *Id.* at 910. The evidence, however, was *potentially useful* because of the "potential results that might be obtained from further tests." *Id.* at 910. Since the defendant provided the prosecutor with "objective, independent evidence" to support this belief prior to its destruction, the *Bohl* court held that he satisfied the *Youngblood* standard. *Id.* at 908, 911, 913-14; *see United States v. Beckstead*, 500 F.3d 1154 (10th Cir. 2007) (interpreting *Bohl* as creating a five-part bad faith analysis, and holding that compliance with standard departmental procedure is not bad faith).

The need for clarification of the *Youngblood* bad faith standard is further exemplified by the Fourth Circuit Court of Appeals decision in the instant case. The court quoted the *Youngblood* bad faith standard of police, by their conduct, indicating the potentially exculpatory nature of the destroyed evidence, and then decided that it was "impossible" to discern the knowledge of the police "because the materials were not tested prior to their destruction." Pet. App. 15a-18a. It follows, therefore, that the court cannot find bad faith if the evidence is destroyed before it is tested. This interpretation of *Youngblood* presents an insurmountable burden, which this Court ought to address.

It further appears that there is a trend in the federal courts of appeal to hold, under *Youngblood*, that non-compliance with standard police procedure is not bad faith. The Fourth Circuit has decided that

the unexplained destruction of potentially exculpatory evidence in violation of controlling congressional and Department of Justice requirements, *i.e.* 21 U.S.C. § 881(f) and 28 C.F.R. § 50.21, does not constitute bad faith. *See* Pet. App. 15a-18a; *United States v. Greenwood*, No. 06-4339 at 5-6 (4th Cir. 2007) (unpublished) (slip opinion).[8]

The Third Circuit Court of Appeals similarly has decided that non-compliance with a controlling departmental regulation, *i.e.* 28 C.F.R. § 50.21, does not constitute bad faith so long as law enforcement substantially complied with the regulation. *Deaner*, 1 F.3d at 200-01; *compare with United States v. Gomez*, 191 F.3d 1214 (10th Cir. 1999) (compliance with 21 U.S.C. § 881(f)(2) and 28 C.F.R. § 50.21 is not bad faith).[9] *See also Garza*, 435 F.3d at 75 -76

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[8] *Compare Varner, supra., with Ex parte Gingo*, 605 So.2d 1237 (Ala. 1992), in which the federal Environmental Protection Agency ("EPA") collected samples, at the direction of the state, determined those samples were hazardous, and, while a state criminal prosecution was ongoing, unbeknownst to the EPA, unlike in *Varner*, destroyed those samples. *Id.* at 1238. The Supreme Court of Alabama affirmed suppression of the EPA test results under *Youngblood* because the defendant could not refute the results, which formed the government's sole proof of the criminal law violations. *Id.* at 1240-41.

[9] *See also United States v. Moore*, 452 F.3d 382, 388-89 (5th Cir. 2006) (holding that the Bureau of Prisons did not act in bad faith when it destroyed taped phone calls, in accordance with its policy, after 180 days); *United States v. Malbrough*, 922 F.2d

("intentionality," or the conscious and deliberate decision to destroy evidence, "is not enough to show bad faith," in this case, the decision was made in violation of "normal procedure" to preserve evidence in an open case, but in compliance with "routine procedure" to purge evidence in storage facilities).

Some federal courts of appeal have imposed a more stringent requirement on the *Youngblood* bad faith standard than even the language of *Youngblood* sets forth. In reliance on its own precedent interpreting *Trombetta*, the Seventh Circuit has read into the *Youngblood* standard the additional requirement that a criminal defendant prove "official animus or conscious effort to suppress exculpatory evidence." *United States v. Chaparro-Alcantara*, 226 F.3d 616, 624 (7th Cir. 2000) (internal quotations omitted) (affirming *Jones v. McCaughtry*, 965 F.2d 476 (7th Cir. 1992)); *United States v. Jobson*, 102 F.3d 214, 218 (6th Cir. 1996).[10] *See Trombetta*, 467

458, 463 (8th Cir. 1990) (holding that the destruction of evidence by state authorities pursuant to a court order and an Iowa statute is not bad faith); *United States v. Heffington*, 952 F.2d 275 (9th Cir. 1991); *New Hampshire v. Smagula*, 578 A.2d 1215 (N.H. 1990) (holding that destruction of a photograph array was not bad faith under *Youngblood* because the officer, in accordance with departmental policy, returned the photographs used in the unsuccessful line-up to their files).

[10] The Sixth and Seventh Circuits also have interpreted footnote "*" to be this Court's holding in *Youngblood*, and therefore require a defendant to prove: "police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed."

U.S. at 59. This is an almost unattainable standard of proof absent a confession of wrong-doing.

In *Platt v. Minnesota Mining & Manuf. Co.*, 376 U.S. 240 (1964), this Court clarified the appropriate factors that a court should consider in change of venue cases. This Court is requested, and should, provide similar clarity for the bad faith analysis because *Youngblood*'s focus on police conduct as the exclusive proof of the nature of the destroyed evidence to establish bad faith has proven unworkable, both in state and federal cases.

This Court should revisit the bad faith standard in order to protect a criminal defendant's fundamental due process right to present a complete defense, balanced against a reasonable duty on the part of the police to preserve potentially exculpatory evidence. Revisiting the bad faith standard can lead to greater clarity, and thus, a more uniform application among the federal and state courts.

II. THE DESTRUCTION OF EVIDENCE IN VIOLATION OF STANDARD POLICY AND PROCEDURE SHOULD RAISE A REBUTTALBE PRESUMPTION OF BAD FAITH.

In this case, law enforcement officers destroyed potentially exculpatory evidence in violation of 21 U.S.C. § 881(f) and 28 C.F.R. § 50.21. *See* Pet. App. 16a-17a ("There is little doubt that the

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See Jobson, 102 F.3d at 218; *Jones*, 965 F.2d at 477. These courts do not limit proof of the nature of the evidence solely to police conduct, as have other federal courts of appeal.

chemicals and glass potentially possessed exculpatory value."). The Fourth Circuit decided, under *Youngblood*, however, that the intentional destruction of potentially exculpatory evidence in violation of congressional and Department of Justice requirements did not constitute bad faith. Pet. App. 18a.

A. Enforcement Of Congressional Intent And The Plain Meaning Of 21 U.S.C. § 881(f) Is Fundamental To A Criminal Defendant's Constitutional Right To Present A Complete Defense.

By its decision in *Varner*, the Fourth Circuit rendered 21 U.S.C. § 881(f) meaningless to criminal defendants, for whose protection Congress enacted subsection (f). The language of § 881(f) is clear and must be read in light of its ordinary, natural, everyday meaning. *See Watson v. United States*, 552 U.S. ___ 06571 (2007) (words are read in light of their ordinary, everyday meanings and the conventions of the English language).[11]

Subsection (f)(1) provides that "all dangerous, toxic, or hazardous raw materials...and any equipment or container...which cannot be separated safely from such raw materials...shall be deemed contraband." Congress amended § 881(f) to include this language in 1990 in response to this Court's *Youngblood* decision. *See* Pub. L. No. 101-647 § 2004. The clear import of this language is to protect

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[11] *See also Boulware v. United States*, 552 U.S. ___ 061509 (2008); *United States v. Santos*, 552 U.S. ___ 0011543 (2008); *Regalado Cuellar v. United States*, 552 U.S. ___ 061456 (2008).

a criminal defendant's "constitutionally guaranteed access to evidence" and fundamental due process right to present a complete defense. *See Trombetta*, 467 U.S. at 485.

Pursuant to § 881(f)(2), Congress authorized the Attorney General to direct the destruction of contraband drug evidence that is dangerous to preserve. The Attorney General exercised this authority by establishing a policy and procedures for the Department of Justice on the destruction of § 881(f)(1) contraband drug evidence. *See* 28 C.F.R. § 50.21(a). Both the statute and ensuing regulation address the *Youngblood* bad faith standard's purpose of limiting the government's obligation to preserve potentially exculpatory evidence to reasonable bounds. 488 U.S. at 58.

The Department of Justice policy and procedures require the Federal Bureau of Investigation and the Drug Enforcement Administration to provide the appropriate prosecutor with 60 days notice prior to the destruction of § 881(f)(1) contraband drug evidence. *Id.* at § 50.21(e)(1) and (e)(5). This comports with the prosecutor's duty to learn of any evidence favorable to the defendant that is known to others acting on the government's behalf. *See Kyles*, 514 U.S. at 437-38. It also advances the government's constitutional discovery obligations. *See e.g. Brady, supra.*[12]

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[12] It is noteworthy that the notice requirement of 28 C.F.R. § 50.21(e)(1) ensures the preservation of potentially exculpatory evidence until approximately 10 days prior to trial, which, under the Speedy Trial

Congress enacted constitutionally permissible standards for the government regarding the preservation and destruction of evidence, an intent with which the Attorney General similarly acted in promulgating 28 C.F.R. § 50.21. Because law enforcement officers, just as criminal defendants, are presumed to know the law, violation of controlling statutory and regulatory requirements should not be without remedy for the individuals who are prejudiced by an unexplained violation, criminal defendants.

As this Court has long affirmed, the objective of a criminal prosecution is to seek the truth. *See e.g. Lopez*, 373 U.S. at 440. The government's extensive authority to investigate and gather evidence of criminal activity is counterbalanced by a criminal defendant's constitutional right to call for government-obtained in his favor. *See* Section I.A., *supra*. By allowing the government to violate the law with impunity, 21 U.S.C. § 881(f), 28 C.F.R. § 50.21 and the *Youngblood* bad faith standard are rendered meaningless in drug cases.

B. This Court Should Settle The Important Question Of Whether The Destruction Of Potentially Exculpatory Evidence In Violation Of Standard Policy and Procedure Should Raise A Rebuttable Presumption of Bad Faith.

This Court should decide whether the government's destruction of potentially exculpatory evidence in violation of standard policy and procedure, including statutory and regulatory

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Act, must begin within 70 days of the filing of an information or indictment. 18 U.S.C. § 3161(c)(1).

mandates, should raise a rebuttable presumption of bad faith. A rebuttable presumption, under these circumstances, would adequately protect the purpose articulated in *Youngblood* of limiting law enforcement's obligation to preserve evidence to reasonable bounds. 488 U.S. at 58.

An example of a workable standard is found in *Lolly v. Delaware, supra.,* where law enforcement officers violated their duty to collect samples of blood splatters left by an unidentified burglar. 611 A.2d at 958, 960. Under the Delaware bad faith standard, the defendant was entitled to the benefit of a rebuttable inference that the uncollected evidence was exculpatory. *Id.* at 961. The government may overcome that rebuttable inference of bad faith by showing a minimal degree of negligence, the lack of probative value of the destroyed evidence, the reliability of secondary or substitute evidence that remains available, and the sufficiency of other evidence. *See Hammond*, 569 A.2d at 87.

The only thing that is clear is that the *Youngblood* bad faith standard is not clear. This Court is requested to revisit the *Youngblood* standard and decide whether due process requires a rebuttable presumption bad faith, specifically in the narrow class of cases where the government violates clearly established standard law enforcement policy and procedure. Such a rebuttable presumption would overcome the practical defects of *Youngblood* and its virtually unattainable standard of proof. *See e.g. Lolly*, 611 A.2d at 960; *Pena*, 166 S.W.3d at 279.

CONCLUSION

The petition for certiorari should be granted.

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